

WO

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Rowpar Pharmaceuticals, Inc., an Arizona corporation, and Micropure, Inc., a Nevada corporation,

No. CV13-01071-PHX DGC

## ORDER

## Plaintiffs,

V

Lornamead, Inc., a Delaware corporation,

Defendant.

Defendant Lornamead, Inc. has filed a motion to dismiss for lack of personal jurisdiction and improper venue or, in the alternative, to transfer the case to the Western District of New York. Doc. 22. The motions are fully briefed. For the following reasons, the Court will deny the motions.<sup>1</sup>

## I. Background.

Rowpar Pharmaceuticals, Inc. (“Rowpar”) is an Arizona company that produces and sells toothpaste under the “CloSYS” brand. Doc. 1, ¶¶ 2, 7. Rowpar produces versions of CloSYS with and without fluoride, known as “CloSYS Fluoride” and “CloSYS Fluoride-Free,” respectively. *Id.*, ¶¶ 20, 22. Micropure, Inc.

<sup>1</sup> The parties' requests for oral argument are denied because the issues have been fully briefed and oral argument will not aid the Court's decision. *See Fed. R. Civ. P. 78(b); Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998). The Court also notes that Defendant's reply memorandum violates the type size requirements of LRCiv 7.1(b)(1). Defendant shall comply with the Court's local rules in all future filings.

1 (“Micropure”) is a Nevada corporation and a wholly owned subsidiary of Rowpar.  
 2 *Id.*, ¶ 8. Lornamead, Inc. (“Defendant”) is a Delaware corporation that manufactures  
 3 toothpaste. *Id.*, ¶¶ 3, 9. Defendant’s principal place of business is in Harrison, New  
 4 York, and it has a manufacturing facility in Tonawanda, New York. *Id.*, ¶ 9.

5 Defendant was at one point the primary manufacturer of CloSYS Fluoride-Free  
 6 for Rowpar. *Id.*, ¶ 35. This arrangement was formalized by a 2006 contract between  
 7 Defendant and Rowpar, known as the Master Supplier Agreement (“MSA”). *Id.*, ¶  
 8 30. In 2012, Defendant negotiated with Rowpar to become a manufacturer of  
 9 CloSYS Fluoride. *Id.*, ¶ 37. At that time, Defendant and Rowpar entered into a  
 10 “Bilateral Confidentiality and Non-Analysis Agreement,” (“BCNA”). *Id.*, ¶ 37. Both  
 11 the MSA and the BCNA contain provisions aimed at preventing the misuse and  
 12 unauthorized disclosure of confidential information. *Id.*, ¶¶ 31-34, 38-41.

13 Rowpar and Micropure (collectively, “Plaintiffs”) filed a complaint asserting  
 14 claims for misappropriation of trade secrets, breach of both the MSA and the BCNA,  
 15 patent infringement, and requesting injunctive relief.<sup>2</sup> Doc. 1. The complaint alleges  
 16 that Defendant used confidential information provided by Rowpar to create a product  
 17 that is “materially identical” to CloSYS Fluoride, which Defendant now manufactures  
 18 for Walgreens. *Id.*, ¶¶ 47-49, 55. The complaint further alleges that the “copy-cat”  
 19 Walgreen’s toothpaste (“Walgreens Product”) produced by Defendant is harming the  
 20 sales and reputation of CloSYS Fluoride. *Id.*, ¶¶ 57-60, Doc 30, ¶ 51. In contrast,  
 21 Defendant contends that it began producing the Walgreens Product months before  
 22 receiving any confidential information regarding CloSYS Fluoride. Doc 22-1, ¶ 11.  
 23 Defendant further alleges that it created the Walgreens Product using the “ingredient  
 24 list on the box” of CloSYS Fluoride and “standard reverse-formulating methods.” *Id.*,

---

26 <sup>2</sup> Defendant alleges that the relevant patent expired on July 7, 2013. Doc 22 at 6, n. 6.  
 27 Because Defendant presents no evidence to support this assertion, and such evidence  
 28 likely would not be considered in any event in a motion to dismiss, the Court does not  
 consider it.

¶ 13. Defendant argues that it is not subject to personal jurisdiction in this Court and that Arizona is the improper venue for this action. *See Doc. 22.*

## II. Motion to Dismiss for Lack of Personal Jurisdiction.

Plaintiffs bear the burden of establishing personal jurisdiction. *See Ziegler v. Indian River Cnty*, 64 F.3d 470, 473 (9th Cir. 1995). Because the Court is resolving Defendant's motions without an evidentiary hearing, Plaintiffs "need make only a *prima facie* showing of jurisdictional facts to withstand the motion to dismiss." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). That is, Plaintiffs "need only demonstrate facts that if true would support jurisdiction[.]" *Id.*<sup>3</sup>

As there is no applicable federal statute governing personal jurisdiction, Arizona's long-arm statute applies. *See Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 559 (9th Cir. 1995). Arizona Rule of Civil Procedure 4.2(a) "provides for personal jurisdiction co-extensive with the limits of federal due process." *Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1050 (9th Cir. 1997). Federal due process requires that a defendant have certain "minimum contacts" with the forum state such that the exercise of personal jurisdiction does not offend "traditional notions of fair play and substantial justice." *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Neither party contends that Defendant is subject to general jurisdiction. The Ninth Circuit has established a three-part inquiry for specific jurisdiction: (1) has the defendant purposefully directed his activities at the forum or a resident thereof or performed some act by which he purposefully availed himself of the privileges of conducting activities in the forum, (2) do the claims arise out of or relate to the defendant's forum-related activities, and (3) is the exercise of jurisdiction reasonable?

---

<sup>3</sup> Defendant's request for an evidentiary hearing (Doc. 39 at 3, n.4) is denied. The Court finds that there is sufficient evidence in the pleadings to render a decision. *See Data Disc, Inc. v. Sys. Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977) ("Because there is no statutory method for resolving [a 12(b)(2) motion to dismiss], the mode of its determination is left to the trial court.")

1       See *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)  
 2 (citation omitted).

3       This Court’s jurisdiction over Plaintiffs’ patent infringement claim is governed  
 4 by the law of the Federal Circuit. *See Nuance Communications, Inc. v. Abbyy*  
 5 *Software House*, 626 F.3d 1222, 1230 (Fed. Cir. 2010). The relevant test, however, is  
 6 virtually identical to the test employed by the Ninth Circuit. *See id.* at 1231 (citing  
 7 *Schwarzenegger*, 374 F.3d at 802).

8       **A. Purposeful Direction or Availment.**

9       The “purposeful availment” or “purposeful direction” prong is analyzed  
 10 differently depending on whether the claim asserted sounds in tort or contract.  
 11 *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1206  
 12 (9th Cir. 2006). In tort cases, courts analyze “whether a defendant purposefully  
 13 direct[ed] his activities at the forum state,” and apply an “effects test that focuses on  
 14 the forum in which the defendant’s actions were felt, whether or not the actions  
 15 themselves occurred in the forum.” *Id.* (citing *Schwarzenegger*, 374 F.3d at 803)  
 16 (internal quotation marks omitted). For contract cases, courts “inquire whether a  
 17 defendant ‘purposefully avails itself of the privilege of conducting activities’ or  
 18 ‘consummate[s] [a] transaction’ in the forum.” *Id.*<sup>4</sup>

19       **i. Contract and Patent Claims.**

20       A defendant has purposely availed himself of a forum where he “deliberately  
 21 has engaged in significant activities within a [s]tate or has created continuing  
 22 obligations between himself and residents of the forum.” *Burger King v. Rudzewicz*,  
 23 471 U.S. 462, 475-76 (1985) (internal citations and quotation marks omitted). The  
 24 purposeful availment standard “requires that the defendant engage in some form of

---

25  
 26       <sup>4</sup> The Federal Circuit uses slightly different language, looking to whether the  
 27 defendant “purposefully directed activities” at the forum. *Nuance*, 626 F.3d at 1231.  
 28 The analysis, however, is essentially the same. *See id.* at 1232-33 (applying *Burger  
 King*).

affirmative conduct allowing or promoting the transaction of business within the forum state.” *Gray & Co. v. Firstenberg Machinery Co.*, 913 F.2d 758, 760 (9th Cir. 1990) (quoting *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1988)). The specific focus on affirmative conduct “is designed to ensure that the defendant is not haled into court as the result of random, fortuitous, or attenuated contacts.” *Id.*

Taken as true, the allegations in Plaintiffs’ complaint and both parties’ affidavits demonstrate that Defendant’s contacts with Arizona are neither random nor attenuated. Defendant has clearly engaged in affirmative conduct promoting business transactions in Arizona. As to the MSA, Defendant has maintained a business relationship with Plaintiffs by serving as the primary manufacturer of CloSYS Fluoride-Free over a period of several years. Doc. 1, ¶¶ 30, 35-36, Doc. 22, ¶ 5, Doc. 30, ¶¶ 12-26. This relationship resulted in multiple contacts with Arizona, including emails, phone calls, and in-person meetings. Doc. 30, ¶¶ 19, 22, 25-26. Defendant then continued to solicit business from Plaintiffs, leading to execution of the BCNA. *Id.*, ¶¶ 14-15, 36-37. The BCNA-related contacts include representatives of Defendant visiting Plaintiff Rowpar’s Arizona offices (Doc. 22-1, ¶ 9-10, 26), sending pricing proposals to Plaintiffs (*id.*, ¶ 21), and email and telephone negotiations of the BCNA (*id.*, ¶ 23). *See also* Doc. 30, ¶¶ 32-49. The Court concludes that these contacts with Arizona concerning the MSA, the BCNA, and Micropure’s patent, satisfy the first requirement for specific jurisdiction.

## ii. Tort Claims.

A defendant purposefully directs conduct at forum where he has “(1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm . . . which is suffered and which the defendant knows is likely to be suffered in the forum state.” *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1077 (9th Cir. 2011) (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)); *see also* *Yahoo! Inc.*, 433 F.3d at 1207

(clarifying that the “‘brunt’ of the harm need not be suffered in the forum state”). The Ninth Circuit has explained that “express aiming” occurs when the “defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

Plaintiffs’ allegation that Defendant intentionally misappropriated their trade secrets for an improper purpose - the formulation of a “copycat” product for Walgreens - satisfies the first of an intentional element. Doc. 1 at ¶ 47-49. Plaintiffs allege that Defendant solicited and received confidential information about the production of Plaintiffs’ CloSYS products and used that information to create the Walgreens Product. Taken as true, these allegations show that Defendant engaged in wrongful conduct targeted at Plaintiffs, whom Defendant knew to be residents of Arizona. Doc. 1 at ¶ 36-37, 42-43, 47-49; *see Menken v. Emm*, 503 F.3d 1050, 1059 (9th Cir. 2007). Finally, Plaintiffs allege that Defendant’s actions caused them harm, which Defendant knew would be felt primarily in Arizona because it was aware that Plaintiffs are Arizona residents. Doc. 1 at ¶ 14-16, 55-60. The facts of this case thus satisfy all three elements of the Ninth Circuit’s test for purposeful direction and the first requirement for specific jurisdiction for the tort claims.

#### **B. Forum-Related Activities.**

“The second requirement for specific jurisdiction is that the contacts constituting purposeful availment must be the ones that give rise to the current suit.” *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000). The Ninth Circuit “measures[s] this requirement in terms of ‘but for’ causation.” *Id.* The requirement is easily satisfied in this case. Plaintiffs allege that Defendant engaged in multiple contacts with Arizona which led to the negotiation and execution of both the MSA and the BCNA, as well as Defendant’s receipt of confidential information regarding Plaintiffs’ products, and that Defendant purposefully misused

1 the confidential information. Doc. 1, ¶¶ 14-16, 37, 42-43. But for these contacts and  
 2 tortious actions, the claims in this case would not have arisen.

3 **C. Reasonableness.**

4 Where the previous two requirements are met, the burden shifts to the  
 5 defendant to “present a compelling case that the presence of some other  
 6 considerations would render jurisdiction unreasonable.” *Burger King*, 471 U.S. at  
 7 477; *see Ballard*, 65 F.3d at 1500 (characterizing this as a “heavy burden of rebutting  
 8 the strong presumption in favor of jurisdiction”). Seven specific factors must be  
 9 considered in making the reasonableness determination: “(1) the extent of the  
 10 defendant’s purposeful interjection into the forum state, (2) the burden on the  
 11 defendant in defending in the forum, (3) the extent of the conflict with the sovereignty  
 12 of the defendant’s state, (4) the forum state’s interest in adjudicating the dispute, (5)  
 13 the most efficient judicial resolution of the controversy, (6) the importance of the  
 14 forum to the plaintiff’s interest in convenient and effective relief, and (7) the existence  
 15 of an alternative forum.” *Bancroft*, 223 F.3d at 1088 (citing *Burger King*, 471 U.S. at  
 16 476-77). Defendant raises arguments as to prongs one, two, five, and seven.

17 Defendant argues that it has not purposefully injected itself into Arizona.  
 18 Doc. 22 at 13. As already discussed, Plaintiffs have alleged facts sufficient to show  
 19 that Defendant has purposefully injected itself into Arizona by soliciting and  
 20 maintaining an ongoing business relationship with Plaintiffs and engaging in tortious  
 21 acts directed at Plaintiffs.

22 Defendant argues it would be burdensome to litigate in Arizona because its  
 23 offices and employees are located in New York. *Id.* Examining the burden on  
 24 Defendant “in light of the corresponding burden” on Plaintiffs if they were required to  
 25 litigate the claim in New York, this factor is neutral. *Brand v. Menlove Dodge*, 796  
 26 F.2d 1070, 1075 (9th Cir. 1986).

27 Defendant contends that the Western District of New York would be a more  
 28

1 efficient venue and cites statistics comparing the caseloads of that district with the  
2 District of Arizona. Doc. 22 at 13. In evaluating this factor, however, the Court  
3 should look “primarily at where the witnesses and the evidence are likely to be  
4 located.” *Menken*, 503 F.3d at 1061 (citation omitted). Because evidence and  
5 witnesses are located in both Arizona and New York, “neither forum has a clear  
6 efficiency advantage[.]” *Id.* Further, both districts appear to have comparable  
7 caseloads. This factor is also neutral.

8 Finally, Defendant correctly argues that an alternative forum is available in the  
9 Western District of New York. Although this factor favors Defendant, an analysis of  
10 the remaining factors demonstrates that Defendant has not presented a compelling  
11 case that personal jurisdiction in Arizona would be unreasonable. Defendant presents  
12 no reason why litigating this suit in Arizona would conflict with New York’s  
13 sovereignty. Nor does it dispute that “Arizona has a strong interest in ensuring that its  
14 residents are compensated for their injuries.” *See Gates Learjet Corp. v. Jensen*, 743  
15 F.2d 1325, 1333 (9th Cir. 1984). Additionally, litigating this claim in Arizona serves  
16 the Plaintiffs’ interest in obtaining convenient and effective relief. On balance, the  
17 seven reasonableness factors do not weigh heavily in favor of Defendant.

18 **D. Conclusion.**

19 The Court finds that specific jurisdiction exists with respect to Defendant for  
20 all claims. The Court further finds that the exercise of personal jurisdiction over  
21 Defendant will not violate the principles of due process.

22 **III. Motion to Dismiss for Improper Venue.**

23 Defendant argues that this case should be dismissed for improper venue.  
24 Doc. 22 at 14-16. The Court finds that venue is proper under 28 U.S.C. § 1331(b)(2),  
25 which provides that a civil action may be brought in “a judicial district in which a  
26 substantial part of the events or omissions giving rise to the claim occurred, or a  
27 substantial part of the property that is the subject of the action is situated.”

The parties' dealings in this case were conducted orally, electronically, and in writing. The parties executed two agreements while Plaintiffs were located in Arizona. Doc. 1, ¶¶ 30, 37. Plaintiffs transmitted the confidential formula for CloSYS Fluoride from Arizona. *Id.*, ¶¶ 42-43. Defendant directed communications about the business relationship to Arizona, including solicitations for new business. *Id.*, ¶¶ 36-37; Doc. 30, ¶¶ 34, 39-47. The negative effects of Defendant's production of the Walgreens Product are felt in Arizona. Doc. 30, ¶ 51. The trade secrets and patent that are the subject of this action are property of Arizona residents. Doc. 1, ¶¶ 7-8, 19, 27-28. Given these facts, the Court concludes that § 1391(b)(2) is satisfied and finds that venue is proper in Arizona.

#### IV. Motion to Transfer.

Defendant moves in the alternative to transfer this action to the Western District of New York under 28 U.S.C. § 1406(a), which provides that where a case is filed “laying venue in the wrong division or district,” the court “shall dismiss, or . . . transfer such case to any district or division in which it could have been brought.” Because the Court finds that venue is proper in the District of Arizona, this motion is denied.

**IT IS ORDERED** that Defendant's motion to dismiss and motion to transfer (Doc. 22) is **denied**.

Dated this 7th day of October, 2013.

David G. Campbell  
United States District Judge